

## **REMARKS/ARGUMENTS**

Reconsideration of the subject application is respectfully requested.

Claims 36-59 were pending as of the Office Action mailing date of October 30, 2007. Applicant amends herein independent claims 36 and 46 and dependent claims 38-41 and has cancelled claim 37. No new matter has been added by any of the amendments.

In view of MPEP 707.07 that requires the Action to be complete as to all matters, Applicant proceeds under the understanding that the present claims are patentable once the references cited herein are overcome.

### **I. REJECTION OF CLAIMS 36, and 46-48 UNDER 35 USC 102(a).**

Claims 36 and 46-48 have been rejected under 35 USC 102(a) as being anticipated by JP 10-155410 to Sato (hereinafter "Sato"). Applicant respectfully traverses this rejection.

The subject invention, as now claimed in independent claims 36 and 46 requires, inter alia:

a sufficient amount of at least one plasticizing agent...  
wherein said baked goods are heat-deformable when hot and  
maintain a heat-deformed shape when said baked goods are  
cooled

The sufficient amounts of plasticizing agents are defined in the specification and can be found in the subject published application (U.S. Patent Application Publication No. 2002/01500663) paragraph [0032].

The disclosure in the Sato reference is deficient because it does not disclose the baking mixture for baked goods that are heat-deformable when hot and maintain a heat-deformed shape when said baked goods are cooled, as currently claimed. In fact, Sato teaches the opposite by stating the composition:

“has a good release property from a baking mold (and) does not give rise to distortion after the release from the molds.”

This is the very opposite of the claimed invention that is able to be formed **after** it is baked.

Thus the teaching of Sato cannot anticipate if it teaches a complete opposite.

Anticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim.”; *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1554, 220 U.S.P.Q. (BNA) 303 (Fed. Cir. 1983).

The Sato does not have the required disclosure to meet the requirements at law establishing anticipation because each of the elements are not disclosed.

Because of the failure of the Sato reference to anticipate the claimed invention, applicant asserts a rejection under 35 USC 102(a) cannot be properly applied.

Applicant respectfully request reconsideration and withdrawal of this rejection.

## **II. REJECTION OF CLAIMS 36, and 46-48 UNDER 35 USC 102(a).**

Claims 36 and 46-48 have been rejected under 35 USC 102(a) as being anticipated by U.S. Patent No. 5,059,432 to Berkowitz (hereinafter "Berkowitz"). Applicant respectfully traverses this rejection.

As stated above, the subject invention, as now claimed in independent claims 36 and 46 requires, inter alia:

a sufficient amount of at least one plasticizing agent...  
wherein said baked goods are heat-deformable when hot and  
maintain a heat-deformed shape when said baked goods are  
cooled

The sufficient amounts of plasticizing agents are defined in the specification as discussed above.

The disclosure in the Berkowitz reference is deficient because it does not disclose a sufficient amount of at least one plasticizing agent, nor does it disclose the baking mixture for baked goods that are heat-deformable when hot and maintain a heat-deformed shape when said baked goods are cooled, as currently claimed. Berkowitz

merely discloses a composition that imparts a long shelf life after processing and does not have any disclosure for the subject invention as now claimed

The Berkowitz reference, like Sato, does not have the required disclosure to meet the requirements at law establishing anticipation because each of the elements are not disclosed.

Because of the failure of the Berkowitz reference to anticipate the claimed invention, applicant asserts a rejection under 35 USC 102(b) cannot be properly applied.

Applicant respectfully request reconsideration and withdrawal of this rejection.

### **III. REJECTION OF CLAIMS 36-59 UNDER 35 USC 103(a).**

The Office Action has rejected the pending claims under 35 USC 103(a) as being unpatentable over Kim. (US Patent No. 4,442,132) in view of Kondo(JP 1-312960) and the above-mentioned Sato and Berkowitz references.

Applicant respectfully traverses this rejection.

The elements of the present invention, as now claimed, are set forth above.

The Office Action states, pages 3 – 4, that the Kim product becomes soft quickly. Applicant respectfully points out the Kim teaches away from the present invention, in

every recited example, by requiring the article be shaped prior to baking (col. 3, lines 28-34; col. 4, lines 3-5; and col. 4, lines 35-39). There is no teaching or suggestion anywhere in the Kim reference for baked goods that are heat-deformable when hot and maintain a heat-deformed shape when said baked goods are cooled, as currently claimed. Because Kim teaches away from the present invention, it cannot be properly used to support an obviousness rejection.

The Office Action, on page 4, then relies on Kondo and summarily concludes “resulting baked product where deformability at an elevated temperature would be no more than obvious.” Applicant respectfully traverses this conclusory statement as being unsupported by the disclosure of Kondo.

Kondo merely discloses using a sugar alcohol. Kondo does not provide any indication that the product of Kondo are baked goods that are heat-deformable when hot and maintain a heat-deformed shape when said baked goods are cooled, as currently claimed. The unsupported conclusory statement, without any teaching or suggestion found in the reference, cannot be used to support an obviousness rejection.

The Office Action next relies on the teaching of Sato. But, as stated above, not only is Sato deficient, but it actually teaches away from the subject invention. Sato teaches the opposite by stating the composition:

“has a good release property from a baking mold (and) does not give rise to distortion after the release from the molds.”

This is the very opposite of the claimed invention that is able to be formed after it is baked.

Thus the teaching of Sato cannot render the subject invention obvious if it teaches a complete opposite.

Finally, the Office Action relies on the teaching of Berkowitz. As stated above, the disclosure in the Berkowitz reference is deficient because it does not disclose a sufficient amount of at least one plasticizing agent, nor does it disclose the baking mixture for baked goods that are heat-deformable when hot and maintain a heat-deformed shape when said baked goods are cooled, as currently claimed. Berkowitz merely discloses a composition that imparts a long shelf life after processing and does not have any disclosure for the subject invention as now claimed.

The Office Action concludes with two statements that are incorrect in their scope. First, on page 4, fifth full paragraph, the Action states "once the art recognized the use of erythritol and xylitol as a sugar replace yours and joke improvers in baked goods, the amount and manipulation of these components would be well within the skill of the art. At most, the amounts are seen as no more than optimization."

The Office Action concludes with the statement "The claimed components are known in the art and are used for their art recognized function to obtain expected results."

These are completely incorrect conclusions.

In the art, it is known that once you bake an article it retains the shape which it had **before** baking. The present invention provides a composition that may be shaped **after** baking. For us the claimed components are not known for this function and there is no art-recognized function as characterized in the Office Action.

The Office Action repeats former reasons of rejection based on some more references which show baking mixtures comprising at least 63.8 percent by weight flour, the one or the other substance which is known as a sweetness sugar replacer but no functional plasticizing agent which is explicitly claimed in the claims 36, 46 and 51 as "a sufficient amount of a plasticizing agent" and which is necessary for the production of the reshaped baked goods that are shaped after baking for which the baking mixtures of the present patent application are intended.

The Office Action comments on the cited references are based on a wrong assumption as to the function of the specific high sugar content in the known baking mixtures for the production of the baked goods which are explained in the present patent application in the paragraphs [0007] to [0013] of the published document US 2002/0150663 A1. This specific high sugar content is in the range of 25% up to 400% by weight, based on flour, as disclosed in the paragraphs [0009] and [0010] of the US 2002/0150663 A1. This specific high sugar content has not the function of a sweetening agent, as assumed in the Action, but the fundamental function of a functional plasticizing agent which is necessary to create the plastic and plastic deformable condition of the hot baked goods which condition is required for the

reshaping of the hot baked goods in general, including disclosed hot wafers, within a reshaping or molding tool in which the hot baked wafers are transformed from a flat shape just after baking into the final shape of the baked wafers which shape is conical in the case of rolled ice-cream cones, or cylindrical in the case of wafer rolls, or cup-like in the case of deep-drawn wafer cups. The reshaping operation and the different final shapes of the baked wafers are clearly disclosed in paragraphs [0007] to [0009] of the US 2002/0150663 A1.

The Office Action does not recognize that the main function of the specific high sugar content in the baking mixtures is the function of a very specific functional plasticizing agent which creates the necessary plastic and plastic deformable condition of the hot baked wafers for the reshaping operation by which the wafers get their final shape. It is this functional plasticizing agent - specific high sugar content - which is replaced according to the present invention by another functional plasticizing agent.

It seems that the Office Action has not clearly recognized that the sugar replacement of the present invention results in baking mixtures which contain the functional plasticizing agents. It further seems that the Office Action has mischaracterized prior reference disclosures relating to the sweetness sugar replacement and incorrectly presumed they disclose the present invention. But the functional plasticizing agents disclosed and claimed are the results of the sugar replacement proposed by the present invention. These functional plasticizing agents are clearly not disclosed in any of the references cited by the Office or even suggested by any one of these references.

The baking mixtures of the present patent application are intended for the production



of reshaped bakery products. This bakery products are reshaped into their final shape just after baking when they are hot and plastic and plastic deformable due to the effect of the functional plasticizing agent contained in the baking mixture from which the bakery products are made. On cooling down to room temperature the reshaped baked products become stiff and crispy due to the effect of the functional plasticizing agent.

The production of reshaped bakery products requires a manufacturing process including a reshaping operation for the baked products. This manufacturing process requires a baking mixture with a functional plasticizing agent which makes the baked products plastic and plastic deformable when hot and stiff and crispy when cooled down to room temperature. Baking mixtures without this functional plasticizing agent cannot be used for this manufacturing process because hot baked products made from those mixtures are not plastic and not plastic deformable when hot and do not become stiff and crispy on cooling down to room temperature.

On the other hand baking mixtures containing this functional plasticizing agent cannot be used for the production of bakery products which obtain their final shape in the baking process itself, as for instance the bakery products mentioned in the five references cited by the examiner. If such a bakery product would be made from a baking mixture containing this functional plasticizing agent then the hot baked product resting on the baking surface or on the baking tray on which it was baked would be in a plastic and easily deformable condition. In this condition the hot baked product could not be withdrawn or removed from the baking surface or the baking tray without destroying the shape obtained in the baking process by the withdrawing or removing operation. If the baked product should retain its shape obtained by the baking process

than the baking process would have to be interrupted till the hot baked product resting on the baking surface or the baking tray is cooled down to room temperature to transform the baked product from its hot plastic and easily deformable condition into a stiff and crisp condition in which the shape of the baked product is not altered by every handling operation performed on the baked product. It is thus self-evident that bakery products which obtain their final shape in the baking process itself cannot be made from baking mixtures containing this functional plasticizing agent mentioned above.

It is the presence of the functional plasticizing agent within the baking mixtures of the present patent application which causes the fact that the five references cited by the Office Action do not teach or suggest the present invention.

The five cited references disclose bakery products which obtain their final shape in the baking process itself and which do not pass a reshaping operation by which they get their final shape. None of the five cited references discloses a manufacturing process for bakery products with a reshaping operation by which the bakery products would get their final shape. The five cited references do not teach or suggest any baking mixture which contains a functional plasticizing agent which creates a plastic and plastic deformable condition of the bakery products when they are hot just after baking.

That the bakery products made from the baking mixtures of the present patent application are produced by a manufacturing process in which they pass a reshaping operation by which the bakery products get their final shape is clearly disclosed in the present patent application.

According to the passage referring to "Demolding and Reshaping" on page 4 of the

published document US 2002/0150663 A1 paragraph [0071]

“the hot baked product leaves the baking mold as a planar endless belt (wafer rolls) or as planar piece and is immediately, in a molding tool, in the still hot state, or ... in the reheated state, brought into a shape for instance by wrapping, rolling, deep-drawing, pressing, embossing, stamping, bending, folding, which shape is fixed on a subsequent short cooling section by solidifying the plasticizing sugar content, ...”.

This plasticizing sugar content is replaced according to the present invention by a plasticizing amount of a plasticizing agent as disclosed and claimed.

Applicant asserts the Office should accept the representation that the sugar replacement of the present invention is the replacement of the known functional plasticizing agent - specific high sugar content in the range of 25% up to 400% by weight, based on flour, in the baking mixture - by a hitherto not known functional plasticizing agent represented by the functional plasticizing agent in the pending claims.

It is accordingly believed to be clear that none of the references, whether taken alone or in any combination, either show or suggest the features of claim 36. Claim 36 is, therefore, believed to be patentable over the art. The remaining claims are believed to be patentable as well because they all are ultimately dependent on claim 36 or contain similar patentable features.

In view of the foregoing, reconsideration and the allowance of claims 36 and 38-59 are solicited.

Petition for extension is herewith made. The extension fee for response within a period of three (3) months pursuant to Section 1.136(a) in the amount of \$1,050.00 in accordance with Section 1.17 is enclosed herewith.

Please charge any other fees which might be due with respect to Sections 1.16 and 1.17 to Deposit Account No. 12-1099 of Lerner Greenberg Stermer LLP.

Respectfully submitted,

/Werner H. Stermer/  
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DB/bb

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